

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA

AT MENGO

CIVIL APPEAL NO. 08/08

BETWEEN

HWAN SUNG INDUSTRIES LTD.....APPELLANT
AND

TAJDIN HUSSEIN & 2 OTHERS..... RESPONDENTS

(CORAM: ODOKI, C.J., TSEKOOKO; KANYEIHAMBA; KATUREEBE;
OKELLO; JJSC).

(Appeal from the Judgment of the Court of Appeal at Kampala before LEM Mukasa-Kikonyogo, DCJ., A. Twinomujuni and S.B.K, Kavuma, JJ.A, dated 12th September 2006 in Civil Appeal No. 71 of2003)

REASONS FOR THE DECISION OF THE COURT.

This is an appeal against the judgment of the Court of Appeal of Uganda by which that Court reversed the decision of the High Court (Okumu- Wengi, J) which had given judgment in favour of the Appellant as Plaintiffs. The High Court had ordered the Respondents as Defendants to pay to the Appellant US.\$8,000.00 being part payment the appellant had made for the goods, general damages and costs of the suit and dismissed the defendant's counter-claim.

On appeal to the Court of Appeal by the Respondents, the Court of Appeal reversed the decision of the High Court and allowed the Respondents counter-claim. The Court ordered the Appellants to pay US. \$8,000.00 (of the counter-claim) with interest at 6% from date of delivery until payment

in full. The Court also awarded costs of the suit in Court of Appeal and the High Court to the Respondents. The appellants were dissatisfied, hence this appeal.

Counsel for both parties filed written submissions before the matter came up for hearing before this Court on 26th May 2009. We considered the said submissions, dismissed the appeal, reserving the reasons for that decision which we now give.

The facts of the case were that the appellant was a local manufacturer of Ice Cream. It placed an order in December 2000 for Orange Oil, an ingredient used for spicing the premier brand “Cool Cool Bar”. A contract was made and executed between the parties governing that order. A sum of US.\$8,000 was paid to the respondents as 50% part payment for the consignment ordered after a sample had been provided. The respondents then supplied the goods. However, the appellant claimed that upon examination they found the goods supplied unsatisfactory and subjected them to Internal and National Bureau of Standards Examination. As a result they rejected the goods and demanded a refund of the US.\$8,000 so far paid, expenses incurred and costs of the suit. The respondent denied liability contending that the goods supplied complied with the samples and that the appellant on delivery took three days before voicing their complaint. The respondents then counter claimed for the balance of the contract price namely US. \$8,000.

As already indicated above, the High Court found for the appellant. The decision was reversed on appeal.

In this Court, the appellant filed three grounds of appeal as follows:

- “1. The Learned Justices of Court of Appeal erred in law and fact when they failed to evaluate the evidence before the trial court and thereby arrived at wrong conclusions and decisions.**
- 2. The learned Justices of Court of Appeal erred in law and fact when they held that the trial judge based his entire decision on an issue which was neither framed nor argued in the lower court**
- 3. The Learned Justices of the Court of Appeal erred in law and fact when they held that the counter claim was proved and therefore the respondents should be paid US. \$ 8,000.**

In their written submissions, counsel for the appellants argued those grounds seriatim and we also considered them likewise. In arguing the first ground, counsel contended that the Court of Appeal had failed to evaluate the evidence of the appellant’s witnesses and had come to the wrong conclusions. He argued that PW3 had analysed the samples and found them to contain suspended matter and therefore not fit for manufacturing Cool Cool Bar Ice Cream. He criticized the Court for “creating a false impression” that orange oil was different from orange oil flavour. Counsel invited this court to find as a matter of fact that Orange oil and orange oil flavour or orange flavour was one and the same thing.

We find this criticism of the Court of Appeal without justification. As a Court of first appeal, the Court of Appeal had a duty to consider and reevaluate the evidence on record and come to its own conclusions. The Court of Appeal started by analysing the contract which was signed by the parties. It pointed out that the contract was for the supply of **ORANGE OIL**. A sample of that product had been supplied by the respondents before the signing of the contract. The contract was worded in these terms

“1. Buyers needs 2,000 kgs. Oranse Oil for his factory use and supplier agree to Supply that quantity.

2. *Both parties agree the price US \$8.000 per kg.*
3. *Buyer is ready to pay half of the total amount which is US. \$8,000 (United States dollar eight thousand only) and balance amount after delivery. But supplier has to supply as per sample which he has delivered before.*
4. *Buyer has authority to reject the goods if he found the Oil which supplier has supplied is not the same Quality as mentioned in the above clause 3.....” (Emphasis added).*

Quite clearly, this was a contract for sale of goods by both description and sample. The goods were described as “**Orange Oil**” and this is emphasised in clause 4 which refers to “***the Oil which supplier has supplied.***” The supplier is obliged “***to supply as per sample which he has delivered before****.

In law, both under the Sale of Goods Act (section 16) and the common law, there are legal obligations and rights that arise when a sale is by description or sample or both. Where there is a dispute as to whether the goods supplied accord with the contract, the court must necessarily go into the evidence and the law to determine the liability of any party. It would be a failure on the part of the court if it ignored the nature of the contract in dispute. Indeed, that is why the first issue framed at the trial was whether the goods which were supplied corresponded with the sample. Both counsel addressed this issue at length, yet the trial judge made no mention of it in his judgment.

In his lead judgment, Twinomujuni, JA, considered this matter thus:-

I have already observed that though it was conceded that this was a contract of sale by sample, the learned trial judge did not even acknowledge that fact in his judgment. There was evidence on record that the

respondent insisted on testing a sample before the sale agreement was signed. If the trial judge had evaluated the evidence as he should have, he would have considered whether the goods which were supplied were even compared with the sample to see whether they corresponded. He did not. In my view, that was a fatal omission given the true nature of the sale agreement. ”

The learned Justice of Appeal then proceeded to analyse the evidence on record and found that no evidence had been led to show that the goods allegedly supplied were compared with the sample to determine whether they corresponded with the sample. The learned Justice of Appeal found that whereas the goods supplied were described as “Orange Oil” as per agreement, the samples tested by PW1, PW2 and PW3 were of “Orange Flavour”.

PW1 testified as follows: -

“My instructions were to inspect on request by the plaintiff and ascertain quality of Ice mixed orange flavour”

In cross-examination he stated, inter alia:

“Yes, the purpose was to inspect as per plaintiff requirements,..... I was not to compare the three samples to any other samples..... The specification of sample was orange flavour..... I did not know the goods are the ones supplied to Hwang Sung by the Defendant. I just sampled them.We did not do identification analysis. We did analyse in full the chemical nature of the product. ”

PW2 testified as follows:-

“This is a Certificate of Analysis No. FA 071/20001 of UNBS. I recognise it. It is a Certificate for samples of Orange Flavour. ”

Then on cross-examination he stated as follows:-

“The sample was orange flavour. The client described it as oranse flavour. I did not test for oranse oil etc. I went out by routine to correctly identify the sample thus the appearance by colour, smell and suspended matter. I did not test it if it was

fit for human consumption.....If I was requested I would have analysed if it was fit for human consumption. ”

PW3, an employee of the appellants kept referring to orange oil flavour. But he also did testify in cross examination:-

“When the products came in they were stored in the raw material store for other flavours which were there. I did not make a written report of the tests I carried out. The supplier was supposed to supply as per sample. It was not necessary to take the initial sample to UNBS. I did not take the original sample to UNBS. ” (Emphasis added).

All this evidence was, in our view, carefully analysed by the learned Justice of Appeal and dealt with it thus:-

“Whereas the contract and DW1, who is the third appellant, say it was Orange Oil which was the subject matter of the contract, PW3 said he examined samples of Orange Oil flavour which the appellants say they did not supply. PW1 and PW2 were the experts from the Uganda National Bureau of Standards who examined samples of goods they call Orange flavour. They also did not know who delivered them to the respondent. Their instructions were to examine the quality of the samples. They were never asked to compare those samples with the samples of the goods supplied to the respondent by the appellants before the contract of sale was signed. From their evidence it is impossible to tell whether the goods they examined were the ones supplied by appellants. As I have already stated, the trial judge simply assumed that the goods were those supplied by the appellants. Yet the evidence before him did not support that assumption. In my view, the assumption he made on the goods was not justified. The claim of the goods which were examined by the Uganda National Bureau of Standards did not connect them to the appellants. The matter is made worse by the fact that they examined Orange flavour, whereas the contract of sale talks of Orange Oil and DW1, the third appellant, says he supplied orange oil and not orange flavour.

DW1 was emphatic that orange oil and orange flavour were two different things

Quite clearly the learned Justice of Appeal analysed the evidence on record and drew his own conclusions. He fully discharged the duty of the first appellate court. We have studied the record and find no reason to fault the findings and decision of the Court of Appeal on this aspect of the case. We found the first ground of appeal without merit and it failed.

The second ground of appeal criticises the Court of Appeal for holding that the trial judge based his entire decision on an issue which was neither framed nor argued in the lower court.

Counsel for the Appellants argued that the trial Court had only summarized all the four issues earlier formulated by the parties into one issue, i.e., whether the respondents were liable in the circumstances to pay to the appellant US.\$8,000. Counsel submitted that the learned trial judge had the power to amend or modify the issues under O.15 Rules 1(5) and 5(1) of the Civil Procedure Rules. He sought to rely on ***ORIENTAL INSURANCE BROKERS Ltd -Vs- TRANSOCEAN Ltd, S.C. CIVIL APPEAL NO. 55*** of 1995 in support of his argument. Counsel submitted that the trial Court had evaluated the evidence before summarizing the issues into one, and was right to hold that the goods were not fit for the purpose for which they were procured.

On the other hand, counsel for the respondents supported the finding and holding of the Court of Appeal. Counsel argued that the ground formulated by the trial judge, and upon which the Judge based his decision, was neither framed nor argued by the parties. He argued that the issues which had been framed by the parties did cover the matters of contention between the parties, i.e., whether the goods supplied

corresponded with the sample, whether the goods were of merchantable quality, whether there was breach of contract and whether the plaintiff was entitled to the relief claimed.

He supported the Court of Appeal's finding that the trial judge, although with power to amend issues, had based its decision on an issue that had not been argued before him.

We considered the submissions of both counsel on this. We are of the view that although a trial court has power to amend issues, that power must be exercised so that the real matters of contention between the parties are brought out clearly and adjudicated upon. Further parties must be heard on the new issue. The amendment must not obscure the real matters in contention. Thus in the **ORIENTAL CASE** (supra) Oder, JSC (RIP) cited with approval the following words of *Duff us, P in ODD JOBS - V- MUBIA (1970) EA 476:-*

"It is therefore the duty of the Court to frame such issues as may be necessary for determining the matters in controversy between the parties. Apart from those provisions, the Court has wide powers of amendment and should exercise these powers in order to be able to arrive at a correct decision in the case and to finally determine the controversy between the parties. In this respect a trial Court may frame issues on a point that is not covered by the pleadings but arises from the facts stated by the parties or their advocates on which a decision is necessary in order to determine the dispute between the parties. "(Emphasis added).

We have already observed that this was a case that involved a sale of goods by description and sample. There was a written contract to that effect. It follows that for the dispute between the parties to be finally determined, the issues involving whether the goods supplied corresponded with the sample and description had to be resolved.

A framed issue which has the effect of obscuring the real matters of dispute between the parties cannot be said to be the sort of issue envisaged by the Rules. In this particular case the issue as framed by the learned trial judge had the effect of obscuring the real issues that had in fact been framed by the parties. As to whether the goods were fit for the purpose, the trial judge ought to have invited the parties to address him on that issue. One has to bear in mind the evidence of PW1 and PW2, the experts from the Uganda National Bureau of Standards that they did not make any analysis as to whether the goods were fit for human consumption.

In the circumstances we could not find fault with the conclusions of the Court of Appeal on this issue. The ground is without merit and must fail.

Ground 3 asserts that the Justices of Appeal erred in law and fact when they held that the counter-claim was proved and that the respondents should be paid US. \$8,000.

In support of this ground, counsel for the appellants argues that the counter-claim was not proved because the first and second respondents, the main parties to the agreement, did not appear in court to give evidence. The only person who appeared in court and gave evidence was the third respondent who had signed the agreement as only a guarantor.

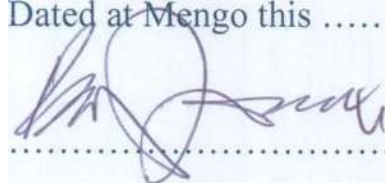
On the other hand, counsel for the respondents supported the finding and decision of the Court of Appeal. He submitted that this issue is partly answered by the findings on the first ground. He further submitted that the goods had been supplied, but that the appellants had failed to prove that the goods supplied were not the goods ordered as per sample. The respondents were therefore entitled to a balance of the price agreed in the contract.

We have considered the submissions of both counsel and we find no substance in the argument of counsel for the appellant. We agree with the Court of Appeal that the trial judge was wrong to reject the respondents' counter-claim when in fact the contract of sale provided that the appellant had to pay a balance of US.\$8,000 upon full delivery of the contract goods.

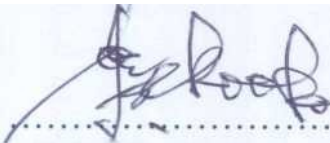
For the reasons given above we dismissed the appeal with costs in this Court and in Courts below, and we confirmed the decision of the Court of Appeal.

6th day of.....October.2009.

Dated at Mengo this



B. J. Odoki
Chief Justice



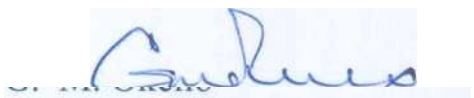
Tsekooko
Justice of the Supreme Court



W. Kanyeihamba
Justice of the Supreme



Bart M. Katureebe
Justice of the Supreme Court



Justice of the Supreme Court

